A **HONG YIK TRADING v. LIZIZ PLANTATION SDN BHD**

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
B ZAINUN ALI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02(F)-29-05-2016(D)]
27 MARCH 2017

C ***CONTRACT:*** *Agreement – Construction and clearing of land – Claim for works done – Whether appellant failed to complete works as per contract – Whether there was damage to land – Issue of whether damage caused by appellant and not by monsoon rain – Onus of proof – Whether on respondent – Whether burden discharged by respondent – Whether appellant entitled to claim*

D By the contract that it executed with the respondent, the appellant undertook to carry out construction and clearing works at the respondent's plantation for a certain monetary consideration ('the works'). Upon completing the works, the respondent sought, but was not paid, the full payment by the respondent. It was the respondent's case, in refusing to pay the appellant the E balance sum of RM397,416.00, that the appellant had failed to carry out the works as specified in the contract, with the result that it had to incur cost of RM554,264.45 to appoint contractors to carry out and complete the necessary remedial works. It was further the respondent's argument that it was entitled to a counterclaim of RM146,857.95, being the difference F between the sum claimed by the appellant for the works and the sum it had incurred to remedy the damage to the land. The High Court Judge ('HCJ') found that the respondent had proven that there was damage to the land that needed to be repaired, and that repair work had been carried out, but ruled that the respondent had not proved that the damage was caused by the G appellant and not by the heavy monsoon rain. The HCJ thus allowed the appellant's claim and dismissed the respondent's counterclaim. On appeal, the Court of Appeal however allowed the appeal on the counterclaim, and further allowed it to be set off against the sum claimed by the appellant. The appellant, in the considered view of the Court of Appeal, had not adduced any evidence to prove that heavy rain was the cause of the defective works, H and in any case, the HCJ was wrong in taking into consideration the heavy monsoon rain when it was not even pleaded by the appellant. The appellant was granted leave to appeal and consequently posed the following question for the determination of the Federal Court, namely: 'when a party on a certain date had confirmed the quantity and quality of the work done as I having been completed to their satisfaction as per the contract and had

authorised payment for such completed works, can that party resile from that position and mount a counterclaim based on alleged defective work or was the party now estopped from disputing such approval/authorisation'.

Held (allowing appeal; declining to answer question posed)
Per Arifin Zakaria CJ delivering the judgment of the court:

(1) The issue which the High Court needed to deliberate was whether or not the appellant failed to complete works in accordance with the specifications of the contract. Since this issue was raised by the respondent, the burden lies on the respondent to prove the same. It lies on the respondent to discharge the said burden. (para 13)

(2) The main issue to be resolved in the counterclaim is whether it was the appellant's acts or omissions which had caused damage to the land. It is erroneous to elevate the issue of inclement weather as the primary issue in this case, since the issue has nothing to do with the counter claim. The critical issue in this case is who caused the damage to the land. (para 21)

(3) The evidence of SD1, SD2, SD3 and SD4 did not go to show that it was the appellant's poor quality of work which had caused the damage to the land. SD1, the respondent's Managing Director, did not personally inspect the appellant's works on the land at the material time, and SD2, the respondent's Estate Manager, only came into the picture after the works on the land had been completed by the appellant. SD3 and SD4, the directors of the contractors who carried the remedial works, absolutely had no knowledge of what had actually caused the damage to the land. None of the respondent's witnesses could positively say that it was the appellant's negligence in performing the works on the land which had caused damage to the land, and consequently failed to support the respondent's counterclaim. (paras 15, 16 & 18)

(4) The evidence of the witnesses for the appellant had corroborated each other in saying that the appellant had completed the works in accordance with the specifications and instructions of the respondent. The witnesses also consistently maintained that the appellant had repaired all the defective works before the works received their approval. This is evident in the fact that the respondent's authorised officers, SP2 and SP3, had approved the works as being completed by the appellant, and had subsequently authorised payment. (paras 22 & 23)

(5) The HCJ was right in holding that the respondent had on the balance of probabilities failed to discharge the burden of proof as regards the counterclaim and in dismissing the same. In the circumstances, it is not necessary to answer the question for which leave has been granted by this court. (para 28)

Bahasa Malaysia *Headnotes*

Melalui kontrak yang dimeterainya dengan responden, perayu bersetuju untuk menjalankan kerja-kerja pembinaan dan pembersihan di tanah milik responden untuk satu balasan kewangan ('kerja-kerja'). Setelah menyiapkan kerja-kerja, perayu menuntut pembayaran tetapi tidak dibayar sepenuhnya oleh responden. Adalah pendirian responden, apabila enggan membayar perayu jumlah baki yang dituntut sebanyak RM397,416.00, bahawa perayu gagal menjalankan kerja-kerja mengikut spesifikasi kontrak, berakibat responden menanggung kos sebanyak RM554,264.45 kerana terpaksa melantik kontraktor-kontraktor bagi menyiapkan kerja-kerja yang tergendala. Responden menghujahkan seterusnya bahawa responden berhak mendapat tuntutan balas sebanyak RM146,857.95, iaitu perbezaan antara jumlah yang dituntut oleh perayu untuk kerja-kerja dan jumlah yang dibelanjakan untuk membaik pulih kerosakan-kerosakan pada tanah. Hakim Mahkamah Tinggi ('HMT') mendapati responden berjaya membuktikan kerosakan pada tanah yang perlu dibaik pulih, dan bahawa kerja-kerja baik pulih memang telah dibuat, namun menegaskan responden gagal membuktikan bahawa kerosakan dilakukan oleh perayu dan bukan oleh hujan monsun yang lebat. Hakim Mahkamah Tinggi dengan itu membenarkan tuntutan perayu dan menolak tuntutan balas responden. Di rayuan, Mahkamah Rayuan bagaimanapun membenarkan rayuan berkaitan tuntutan balas, dan seterusnya membenarkan supaya jumlah tuntutan balas tersebut ditolak selesai dari jumlah yang dituntut perayu. Perayu, menurut Mahkamah Rayuan, gagal mengemukakan sebarang bukti bahawa kerosakan pada tanah adalah disebabkan oleh hujan lebat, dan apapun, HMT khilaf apabila mengambil kira hujan lebat monsun sedangkan ini langsung tidak diplid oleh perayu. Perayu diberi kebenaran untuk merayu dan mengemukakan soalan berikut untuk pertimbangan dan keputusan Mahkamah Persekutuan, iaitu: 'apabila sesuatu pihak pada satu tarikh mengesahkan kuantiti dan kualiti kerja-kerja yang dibuat sebagai telah dibuat dengan sempurna dan memuaskan hatinya serta berdasarkan kontrak dan telah mengizinkan pembayaran untuk kerja-kerja yang siap itu, bolehkah pihak tersebut memungkiri pendiriannya serta membuat tuntutan balas dengan mendakwa bahawa kerja-kerja yang dibuat adalah cacat atau adakah pihak tersebut diestop dari mempersoalkan pengesahan/keizinannya tersebut'.

Diputuskan (membenarkan rayuan; enggan menjawab soalan yang dikemukakan)

Oleh Arifin Zakaria KHN menyampaikan penghakiman mahkamah:

(1) Isu yang perlu ditangani oleh Mahkamah Tinggi adalah sama ada perayu gagal menyiapkan kerja-kerja mengikut spesifikasi kontrak. Oleh kerana isu ini dibangkitkan oleh responden, maka beban adalah atas responden untuk membuktikannya. Menjadi tanggungjawab responden untuk melunaskan beban tersebut.

(2) Isu utama yang perlu diputuskan dalam tuntutan balas adalah sama ada kerosakan pada tanah disebabkan oleh perbuatan atau ketinggalan perayu. Adalah salah untuk mengutarakan isu cuaca buruk sebagai isu utama dalam kes ini kerana isu tersebut tiada kena mengena dengan tuntutan balas. Isu kritikal di sini adalah siapa yang menyebabkan kerosakan pada tanah.

(3) Keterangan SD1, SD2, SD3 and SD4 tidak menunjukkan kerosakan pada tanah adalah disebabkan oleh kualiti kerja perayu yang rendah. SD1, Pengarah Urusan responden, tidak memeriksa tanah secara peribadi pada masa material, dan begitu juga SD2, Pengurus Ladang responden, hanya terlibat selepas kerja-kerja sudah pun disiapkan oleh perayu. SD3 dan SD4 pula, iaitu pengarah-pengarah kontraktor yang melakukan kerja-kerja baik pulih, langsung tidak tahu apa sebenarnya yang menyebabkan kerosakan pada tanah. Tidak seorang pun saksi-saksi responden mampu mengatakan dengan positif bahawa penyebab kerosakan pada tanah adalah kecuaian perayu dalam menjalankan kerja-kerja, dan keterangan mereka, dengan itu, tidak menyokong tuntutan balas responden.

(4) Keterangan saksi-saksi perayu menyokong antara satu sama lain dalam menyatakan bahawa perayu telah menyiapkan kerja-kerja mengikut spesifikasi dan arahan yang diberikan oleh responden. Saksi-saksi juga secara konsisten mengatakan bahawa perayu telah membaik pulih semua kecacatan pada kerja-kerja sebelum kerja-kerja disahkan oleh mereka. Semua ini jelas terserlah pada fakta bahawa pegawai-pegawai pengesah responden, SP2 dan SP3, telah mengesahkan kerja-kerja sebagai telah siap dan telah meluluskan pembayaran.

(5) Hakim Mahkamah Tinggi betul dalam mendapati bahawa responden gagal atas imbangan kebarangkalian untuk melunaskan beban bukti mengenai tuntutan balas dan dalam menolak tuntutan balas berkenaan. Dalam hal keadaan yang wujud, tidak lagi perlu untuk menjawab soalan untuk jawapan mana kebenaran telah diberi oleh mahkamah ini.

Case(s) referred to:

Chew Boon Ee v. L Ramanathan Chettiar & Ors [1959] 1 LNS 15 PC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

International Times & Ors v. Leong Ho Yuen [1980] 1 LNS 31 FC ***(refd)***

Selvaduray v. Chinniah [1939] 1 LNS 107 SC ***(refd)***

Stoney v. Eastbourne Rural District Council [1927] 1 Ch 367 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 101

A *For the appellant - Jegadeeson Thavasu; M/s Jega Kumar & Partners*
For the respondent - N Chandran, Tenh Cheng Tiap & Ranjan Chandran; M/s CK Lim, Tenh & Chong

[Editor's note: For the Court of Appeal judgment, please see Liziz Plantation Sdn Bhd v. Hong Yik Trading [2016] 1 LNS 141 (overruled).]

B *Reported by Wan Sharif Ahmad*

JUDGMENT

Arifin Zakaria CJ:

C **Introduction**

[1] This is an appeal by appellant, (the plaintiff in the High Court) against the Court of Appeal's decision dated 18 August 2014. On 27 February 2014, the High Court had allowed the appellant's claim and dismissed the respondent's counterclaim (the defendant in the High Court). Dissatisfied with the High Court's decision, the respondent successfully appealed to the Court of Appeal against that decision.

D

[2] Leave to appeal was granted by this court on 28 April 2016. The question of law posed to us reads as follows:

E

> When a party on a certain date had confirmed the quantity and quality of the work done as having been completed to their satisfaction as per the contract and had authorised payment for such completed works, can that party resile from that position and mount a counterclaim based on alleged defective work or is the party now estopped from disputing such approval/authorisation.

F

Brief Facts

[3] The pertinent facts are as follows: The respondent appointed the appellant to do construction works and cleaning of the respondent's plantation ("the works"). The appellant claimed that it had carried out the works but was not paid in full. The appellant claimed the outstanding sum of RM397,416 which it claimed to be due and payable to the appellant by the respondent for the works.

G

[4] There were written contracts executed between the appellant and respondent for the works. The contract was contained in the letter of appointment dated 13 November 2009 and the acceptance of the same by the appellant. There were also four other written contracts between the parties. Three of the four contracts were all dated 1 August 2010. Each of these contracts was for different work description. However, all the three contracts have identical terms and conditions.

H

I

[5] The fourth contract is a contract to extend the contract period under the three earlier contracts. The extension contract was made on 1 January 2011. Under the extension contract, the parties agreed that the contract period under the three earlier contracts be extended from 1 January 2011 "until the completion of the whole entire area". The relevant clause in the extension contract reads:

> Due to bad weather and machinery breakdown, therefore both parties had agreed to extend this contract period from 01st January 2011 until completion of the whole entire area.
>
> Others (*sic*) terms and conditions including the contract rate in the said agreement remains unchanged.

[6] The respondent contended that the appellant failed to carry out the works as stipulated in the contract in particular as required under cl. 2 of the contract. The respondent claimed that it had to appoint two other contractors to complete the remedial works at the total cost of RM554,264.45. In the circumstances, the respondent filed a counterclaim against the appellant in the High Court to recover the sum of RM146,857.95 being the difference between the sum claimed by the appellant for the works and the sum incurred by the respondent to complete the remedial works.

[7] The High Court allowed the appellant's claim and dismissed the respondent's counterclaim. The learned High Court Judge held that:

> Berdasarkan kertas kausa, keseluruhan keterangan yang dikemukakan serta hujahan yang dikemukakan oleh peguamcara yang terpelajar kedua-dua pihak, atas imbangan kebarangkalian saya mendapati Plaintif berjaya membuktikan tuntutan mereka terhadap Defendan. Sebaliknya saya mendapati Defendan gagal untuk membuktikan tuntutan balas mereka terhadap Plaintif ...

Proceedings In The Court Of Appeal

[8] Aggrieved, the respondent then appealed to the Court of Appeal. The Court of Appeal allowed the respondent's appeal with cost. The Court of Appeal held:

> [29] We have carefully read the written judgment of the learned High Court Judge in instant appeal. Unfortunately we could not find any discussion on the testimony of the witnesses as the probable cause of the defective works that required to be remedied. We find that there is no appreciation or evaluation of the testimony by the respondent's witnesses particularly that of SD3 and SD4 as to why they were engaged to do the remedial work.
>
> [30] For the above reason, we allowed the appeal by the appellant on the counter-claim and allowed it to be set off against the sum claimed by the respondent and ordered that the respondent pay the appellant the balance of RM146,857.95 under the counterclaim. We order no cost here and below.

A **Proceedings In This Court**

[9] Learned counsel for the appellant submitted that the sole issue in this case is "whether the appellant had completed the works in accordance with specifications and the same was approved by the respondent nominated and/ or appointed representatives".

B

[10] With regards to the respondent's counterclaim, learned counsel for the appellant submitted that, the learned High Court Judge had found that the respondent had proven that there was damage to the land that needed to be repaired, and repair works had been carried out and completed by the new contractors ie, Saga Timur and JWY Maju who were appointed by the respondent. However, the learned High Court Judge also found that the respondent had failed to prove that the damage to the land was caused by the appellant, and not by the heavy monsoon rain as suggested and submitted by learned counsel for the appellant. (paras 30-32 of the learned High Court Judge's judgment).

C

D

[11] In allowing the appeal, the Court of Appeal made the following findings:

(a) The appellant failed to adduce any evidence to prove that the heavy monsoon rain was the cause of the defective works that required remedial action by other contractors engaged by the respondent. (para. 15 of the learned Court of Appeal Judges' judgment). Besides, the learned judges were also unable to find any discussion by the learned High Court Judge on the testimony of the witnesses as to the probable cause of the defective works that required to be remedied. (para 29 of the learned Court of Appeal Judges' judgment);

E

F

(b) In addition, the heavy monsoon rain issue was never pleaded in any of the pleadings. Therefore, the Court of Appeal opined that the High Court Judge was wrong in taking into consideration the heavy monsoon rain when it is not even pleaded; and

G

(c) The Court of Appeal was of the view that the High Court failed to take into consideration the evidence of SD3 and SD4 in coming to its decision.

Learned counsel for the appellant submitted that the findings of the Court of Appeal were against the weight of the evidence before the court.

H

Findings Of This Court

[12] It is settled law that the burden of proof rests throughout the trial on the party who asserts that the facts exist (s. 101 of the Evidence Act 1950). Where a party on whom the burden of proof lies has discharged that burden, then the evidential burden shifts to the other party. However, if the party on

I

whom the burden of proof lies fails to discharge it, the other party need not call any evidence. This is highlighted in the case of *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 1 MLJ 253 where Terrell, Ag CJ stated:

> ... it is clear that the onus is on the plaintiff to prove his case. After the conclusion of the whole case, there must be some preponderance in his favour. It may be true that the plaintiff established a *prima facie* case, but at the conclusion of the trial, the learned Judge has found that the position was exactly even, i.e. that any preponderance in the plaintiff's favour had disappeared. That being the case, the plaintiff must necessarily fail, as he has not discharged the onus which is upon him. No doubt the defendant would equally have failed if he had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of the plaintiff.

In the case of *International Times & Ors v. Leong Ho Yuen* [1980] 1 LNS 31; [1980] 2 MLJ 86 at p 87, Salleh Abas FJ (as he then was) restated the same position in the following words:

> For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v. Jatashankar Dossa & Ors* AIR 1961 SC 1474, 1478 and *Raghavamma v. Chenchamma* AIR 1964 SC 136, 43). The first sense, signified by the expression burden of proof such as referred to in section 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* 7th Edition paras. 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to sections 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail

Similarly, in the case of *Stoney v. Eastbourne Rural District Council* [1927] 1 Ch 367, Lord Hanworth MR had articulated on the issue of the burden of proof in the following manner:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feather on one side or the

A other, and of saying that if there were two feathers on one side and one on the other, that would be sufficient to shift the onus. What is meant is, that in the first instance, the party on whom the onus lies must prove his case sufficiently to justify a judgement in his favour if there is no other evidence given.

B **[13]** Coming back to the respondent's counterclaim, the respondent alleged that the appellant had failed to carry out the works to the satisfaction of the respondent as covenanted under cl. 2 of the contract, causing the land to be damaged and in need of repair. As a consequence, it had to engage two other contractors to carry out the remedial works at the total cost of RM554,274.45. The issue which the High Court needed to deliberate on was C whether or not, the appellant failed to complete the works in accordance with the specifications as agreed under the contract as alleged by the respondent. Since the issue was raised by the respondent, we hold that the burden lies on the respondent to prove the same. It lies on the respondent to discharge the said burden.

D

[14] To prove its case, the respondent had called the respondent's managing director (SD1), the respondent's estate manager (SD2), the Director of Saga Timur Sdn Bhd (SD3) and the director of JWY Maju Jaya Enterprise (SD 4). Saga Timur Sdn Bhd and JWY Maju Jaya Enterprise were the E contractors appointed by the respondent to carry out remedial works on the land. The evidence of SD1, SD2, SD3 and SD 4 all pointed to the facts that the terraces and the slopes were defective as they were not properly constructed by the appellant to the extent that they required remedial work.

[15] Having scrutinised the evidence of SD1, SD2, SD3 and SD4 in F totality, we are of the view that the evidence adduced through these witnesses did not go to show that it was the appellant's poor quality of work which had caused the damage to the land. Although SD1 was the managing director of the respondent, and was in charge of the overall running of the company, he did not personally inspect the appellant's works on the land at the material G time. Instead, SD1 had authorised SP2, SP3 and SP4 to perform the inspection work on the land and according to them, the appellant had performed the works satisfactorily. As for SD2, he was only appointed as the estate manager of the respondent's Kuala Betis II estate on 18 July 2011, after the works on the land had been fully completed by the appellant.

H **[16]** As for SD3 and SD4, they were the directors of the contractors appointed by the respondent to carry out the remedial works. In their testimonies, they stated that they were brought in by the respondent to carry out remedial works on the land. In other words, they had absolutely no knowledge of what had actually caused the damage to the land apart from I what had been told to them by SD1.

[17] One of the issues raised by the Court of Appeal in its judgment was the fact that the High Court Judge did not take into consideration the evidence of SD3 and SD4 in dismissing the respondent's counterclaim. However, the evidence of SD3 and SD4 is not directly relevant to the main issue in the counterclaim; which is whether it was the appellant's shoddy works which had caused damage to the land. They came onto the land after the damage to the land had already occurred. For those reasons, we hold that the learned High Court Judge had not committed any error in disregarding their evidence in coming to his decision.

[18] We are also of the view that, if at all, the evidence of the respondent's witnesses were to be considered, they could only be used to confirm the fact that there was damage to the land when they inspected the land. None of the witnesses whom the respondent had produced before the court could positively say that it was the appellant's negligence in performing the works on the land which had caused damage to the land. As we stated earlier, in the counterclaim, it is for the respondent to prove that the damage to the land as alleged was caused by the appellant's failure to perform the works as per the specifications. For the reasons stated above, we hold that the evidence of SD1, SD2, SD3 and SD4 failed to support the respondent's counterclaim.

[19] Another issue which the Court of Appeal had raised in its judgment is that the trial judge had erred in his finding that the damage to the land was caused by heavy rain when there is no evidence before the court to support such finding. Furthermore, heavy rain was not pleaded by the appellant. Thus, the trial judge's finding is against the strict principle of pleading that parties are bound by their pleadings.

[20] For ease of reference, we produce below the finding of the trial judge on this issue which reads:

> Saya mendapati bahawa Defendan (respondent) berjaya membuktikan bahawa terdapatnya kerosakan pada tanah yang perlu diperbaiki dan pembaikian telah dilakukan oleh kontraktor baru yang mereka lantik. Namun, saya mendapati mereka gagal membuktikan bahawa kerosakan tersebut adalah diakibatkan oleh plaintiff dan bukannya akibat hujan lebat musim hujan sepertimana yang dicadangkan oleh peguam plaintif terpelajar.

[21] The gist of the learned trial judge's decision is that although the respondent had succeeded in proving that there was damage to the land, it failed to prove that the damage was caused by the appellant and not by the heavy rain. The main issue to be resolved in the counterclaim is whether it was the appellant's acts or omissions which had caused damage to the land. It is erroneous to elevate the issue of inclement weather as the primary issue in this case, since the issue has nothing to do with the counterclaim. The critical issue in this case is who caused the damage to the land.

[22] In this regard, it is pertinent to consider the evidence of the appellant's four witnesses, including the appellant himself. Three of the witnesses were former employees of the respondent. They were the general manager (SP2), the assistant general manager (SP3) and the senior general manager (SP4). They were the respondent's authorised officers who had been appointed by the respondent to supervise and monitor the works. All the four witnesses corroborated each other in saying that the appellant had completed the works in accordance with the specifications and instructions of the respondent.

[23] The witnesses also consistently maintained that the appellant had repaired all the defective works before the works received their approval. This is evident in the fact that the respondent's authorised officers, namely SP2 and SP3 had approved the works as being completed by the appellant, and had subsequently authorised payment as evident by exhs. "P8", "P9", "P10", "P11" and "P12".

[24] As a matter of argument, if indeed the respondent was not satisfied with the appellant's quality of works, they should have raised the issue at the material time, that is before the works were approved by its authorised officers. If any remedial works is required, the respondent should have instructed the appellant to carry out the works before the works were approved, and payments authorised by the respondent's employees. It is not open for the respondent to claim that the appellant's works were defective after the works had already been approved by its duly authorised officers.

[25] There was also an attempt by the respondent to challenge the credibility of the appellant's witnesses by alleging that they (SP2, SP3 and SP4) were untruthful witnesses and thus, their evidence ought to be rejected. According to SD1, their employment with the respondent was terminated on the ground that they had been dishonest in carrying out their duty in approving and verifying the appellant's claims and a police report had been lodged against them, but the respondent admitted that no action had been taken by the police against any of them.

[26] The fact that SP2, SP3 and SP4 had been terminated from their employment on the ground of dishonesty and a police report lodged against them does not necessarily follow that their evidence ought to be disregarded by the court. On this issue, we are in complete agreement with the learned trial judge that the allegations levelled against SP2, SP3 and SP4 by the respondent are not corroborated by any independent evidence. The court cannot simply be moved to act by a mere allegation or suspicion.

[27] Further, the credibility of a witness is primarily a matter for the trial court to decide. As observed by Mohamed Dzaiddin FCJ in the case of *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517 at p. 175 (CLJ); p. 527 (MLJ):

> ... it is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy (*Crofter Hand Woven Harris Tweed Co Ltd & Ors v. Veitch & Anor* [1942] 1 All ER 142 (HL) per Lord Porter at p. 167).

The same view was expounded by the Privy Council in the case of *Chew Boon Ee v. L Ramanathan Chettiar & Ors* [1959] 1 LNS 15; [1959] MLJ 235 at p. 239, where The Rt Hon L M D De Silva had this to say:

> A Court of Appeal has no doubt jurisdiction to reverse a trial Court on all questions of fact and law but as stated by Lord Reid in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p 375 "it is only in rare cases that an appeal Court could be satisfied that the trial Judge has reached a wrong decision about the credibility of a witness". The principles which should guide a Court of Appeal dealing with findings of fact by a trial Court have been set out in many cases and several of them have been cited to their Lordships. They think it would be sufficient for the purposes of this appeal to refer to two passages from the judgment of Viscount Simonds in *Benmax v. Austin Motor Co. Ltd*. the case mentioned earlier. Referring to cases previously decided he said:
>
> > I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned Judge.

We agree with the above observations of the learned judges, stated above, in that the appellate court should be slow in disturbing the finding of the trial court especially when the finding turns on the credibility of witnesses as in the present case.

Conclusion

[28] Premised on the facts and circumstances of this case, we agree with the finding of the learned trial judge that the respondent had, on the balance of probabilities, failed to discharge the burden of proof which rest on the respondent as regards the counterclaim. The learned trial judge was right in dismissing the counterclaim of the respondent. That in our view is sufficient to dispose of the present appeal. It is therefore not necessary for us to answer the question for which leave had been granted by this court. In the result, the appeal is allowed with costs both here and in the Court of Appeal. The order of the Court of Appeal is accordingly set aside. Hasan bin Lah FCJ had read this judgment in draft and agreed to it.